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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL RAY MASON,

Defendant and Appellant.

C045831

(Super. Ct. No.
00F9100)

Defendant Michael Ray Mason was convicted by a jury of eight counts of burglary of a vehicle, five counts of receiving stolen property, and three counts of petty theft. On appeal, he contends: (1) two of the convictions of receiving stolen property were improper because the property he "received" was the same property he had stolen, (2) he should not have been ordered to pay victim restitution with respect to a count that had been dismissed, (3) he is entitled to an additional seven days of custody credit, and (4) imposition of his upper term sentence violates *Blakely v. Washington* (2004) 542 U.S. ____ [159 L.Ed.2d 403] (*Blakely*). The first three contentions have

merit; the fourth does not. We shall reverse and modify the judgment accordingly. The relevant facts are set forth in connection with each contention.

DISCUSSION

I. Improper Dual Conviction for Receiving Stolen Property

Counts 13 and 15 alleged petty theft with a prior (Pen. Code, § 666), while counts 14 and 16 alleged defendant had received property that had been stolen from the same victims named in counts 13 and 15 (Pen. Code, § 496, subd. (a).)¹ The evidence confirmed that the convictions for counts 14 and 16 were premised on receipt of the same property that defendant had taken in the commission of counts 13 and 15. Penal Code section 496, subdivision (a) states in part that "[n]o person may be convicted both pursuant to this section and of the theft of the same property." Thus, a person cannot be convicted of

¹ Penal Code section 496, subdivision (a) provides: "Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a state prison, or in a county jail for not more than one year. However, if the district attorney or the grand jury determines that this action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars (\$400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year. [¶] A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property."

both theft and receiving the same stolen property. (*People v. Allen* (1999) 21 Cal.4th 846, 857; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.)

The People concede defendant's argument that the convictions of counts 14 and 16 were improper. Our review discloses the concession is appropriate. Accordingly, we shall reverse the convictions of counts 14 and 16.

II. Improper Victim Restitution

Count six of the second amended consolidated information charged defendant with burglarizing a car belonging to Deborah Loyd.² The third amended consolidated information did not reallege this count, and defendant was not convicted of any offense with respect to Loyd. The court nonetheless ordered victim restitution of \$430 be paid to Loyd. The People concede that aspect of the restitution order was improper. (Pen. Code, § 1202.4, subd. (a).)³ We shall direct that the judgment be modified to strike the victim restitution as to Loyd.

III. Defendant Is Entitled to Seven Additional Days of Credit

Defendant argues -- and respondent again properly concedes -- that he is entitled to an additional seven days of custody credit because sentencing was continued one week and

² Deborah Loyd's surname is also spelled "Lloyd" in the record.

³ Penal Code section 1202.4, subdivision (a)(1) states: "It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant *convicted of that crime.*" (Italics added.)

this additional period of confinement was not awarded to defendant. (*People v. Acosta* (1996) 48 Cal.App.4th 411, 427 [credit issue may be raised on appeal in the absence of an objection in the trial court where other issues are raised on appeal].) We shall direct that the abstract of judgment be modified accordingly.

IV. *Blakely* Error

Applying the Sixth Amendment to the United States Constitution, the United States Supreme Court held in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be tried to a jury and proved beyond a reasonable doubt. (*Id.* at p. 490.) For this purpose, the statutory maximum is the maximum sentence that a court could impose based solely on facts reflected by a jury's verdict or admitted by the defendant. Thus, when a sentencing court's authority to impose an enhanced sentence depends upon additional fact findings, there is a right to a jury trial and proof beyond a reasonable doubt on the additional facts. (*Blakely, supra*, 159 L.Ed.2d at pp. 413-414.)

Relying on *Apprendi* and *Blakely*, defendant claims the trial court erred in imposing the upper term on count 1 because the court relied upon facts not submitted to the jury and proved beyond a reasonable doubt, thus depriving him of the constitutional right to a jury trial on facts legally essential to the sentence.

The contention fails. One of the reasons the trial court gave for imposing the upper term was defendant's prior criminal convictions. (Cal. Rules of Court, rule 4.421(b)(2).) As we have noted, the rule of *Apprendi* and *Blakely* does not apply to a prior conviction used to increase the penalty for a crime. Since one valid factor in aggravation is sufficient to expose defendant to the upper term (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433), the trial court's consideration of other factors, in addition to the prior convictions, in deciding whether to impose the upper term did not violate the rule of *Apprendi* and *Blakely*.

DISPOSITION

The judgment is reversed as to counts 14 and 16. Defendant is awarded seven additional days of custody credit. The court shall modify the judgment to strike the \$430 in victim restitution ordered to be paid to Deborah Loyd. The superior court is directed to issue an amended abstract of judgment reflecting these changes and to forward a certified copy thereof to the Department of Corrections.

RAYE, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.